DOCUMENT RESUME

ED 318 093 EA 021 701

AUTHOR Mawdsley, Ralph D.
TITLE Employees.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE 89
NOTE 32p.; In: Thomas, Stephen B., Ed. The Yearbook of Education Law, 1989. National Organization on Legal Problems in Education, 1989 (EA 021 700), p1-31.
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Reports - Research/Technical (143)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Certification; Civil Liberties; Contracts; *Court Litigation; Dismissal (Personnel); Due Process; Elementary Secondary Education; *Employer Employee Relationship; *Equal Opportunities (Jobs); Legal Responsibility; *Public Schools; Reduction in Force; *School Law; *School Personnel; Teacher Rights; Tenure

ABSTRACT

This chapter covers the nearly 230 cases reported in 1988 involving precollegiate, public-sector employees. Those cases where purely procedural issues are involved are omitted, and procedural issues in the remaining cases are deemphasized. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline has the greatest concentration of cases. Legal issues covered by the review are organized in the following sections: (1) discrimination in employment by race, religion, sex, age, or handicap; (2) substantive constitutional rights including freedom of speech and association, along with issues of privacy and substantive due process; (3) procedural due process; (4) issues of dismissal, nonrenewal, demotion, and discipline (for insubordination, unprofessional conduct, unfitness, immorality, or incompetence); (5) reduction in force and involuntary leaves of absence; (6) contractual disputes; (7) tenure; and (8) certification, decertification, revocation, and suspension. (MLF)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

ED318093

1

EMPLOYEES

Ralph D. Mawdsley

Introduction / 2
Discrimination in Employment / 2
- Race / 3
- Religion / 4
- Sex / 4
- Age / 6
- Handicap / 6

Substantive Constitutional Rights / 7
- Speech / 8
- Association / 8
- Privacy / 9
- Substantive Due Process / 9

Procedural Due Process / 10
- Liberty and Property Interests / 11
- Aspects of Notice / 12
- Aspects of Hearing / 13

Dismissal, Nonrenewal, Demotion, and Discipline / 15
- Insubordination / 16
- Unprofessional Conduct, Unfitness, Willful Neglect of Duty / 17
- Immorality / 18
- Incompetence / 18
- Compliance with School Board Policies and State Statutes / 19

Reduction-in-force and Involuntary Leaves of Absence / 21
- Necessity for Reduction-in-force / 22
- Elimination of Position / 22
- Selection of Employees / 22
- Realignment/Reassignment / 23
- Call-back Rights / 24

Contract Disputes / 25
- Board Policies and Contract Stipulations / 25
- Administrative Regulations and Statutory Provisions / 26

Tenure / 28
- Tenure Status / 28
- Tenure by Default or Acquiescence / 29

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

T. Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

EA 021 701

Certification / 30
Certification Standards / 30
Decertification, Revocation, or Suspension / 30

INTRODUCTION

This chapter covers the nearly 230 cases reported in calendar year 1988 involving precollegiate, public-sector employees. This review excludes criminal cases and cases analyzed in other chapters of the Yearbook—tort and collective bargaining. Those cases which deal only with procedural matters are omitted and procedural matters are deemphasized in the remaining cases.

Unlike prior years, the year of 1988 saw no Supreme Court case related to school employment; however, Supreme Court decisions from prior years are cited where they are necessary for an understanding of current cases. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline has the greatest concentration of cases.

DISCRIMINATION IN EMPLOYMENT

Discrimination claims are based on a number of federal statutes. Title VII of the Civil Rights Act of 1964, the workhorse of the anti-discrimination legislation, prohibits employment discrimination in both public and private institutions on the basis of race, color, religion, sex, and national origin.[1] Gender-based employment discrimination is prohibited by title IX of the Education Amendments of 1972[2] and gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[3] Discrimination on the basis of age for persons forty and over is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA)[4] and discrimination against "otherwise qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.[5] Discrimination based on national origin is prohibited by section 1981 of the Civil Rights Act of 1964.[6]

In general, a plaintiff alleging employment discrimination must demonstrate a *prima facie* case: that plaintiff was burdened or was a

1. 42 U.S.C. § 2000 *et seq.*
2. 20 U.S.C. § 1681 *et seq.*
3. 29 U.S.C. § 206 (d) (1).
4. 42 U.S.C. § 1601 *et seq.*
5. 20 U.S.C. § 794 *et seq.*
6. 42 U.S.C. § 1981.

member of a class burdened[7] by an employer policy or practice affecting a category protected by one or more of the anti-discrimination statutes. The burden of proof then shifts to the employer to articulate by clear and convincing evidence a nondiscriminatory reason for the employee's treatment which the plaintiff can then attempt to refute by a preponderance of the evidence as pretextual.

Race

The burden of proof issue for both employee and employer was demonstrated in one of the federal district court cases.[8] A black junior high principal was nonrenewed in that position for violating school board policy regarding admitting students to the school's Isolated Learning Center, for low teacher morale, and for inadequate discipline. When the former principal was not hired for one of two vacant elementary principalships he alleged race discrimination. The school district was able to rebut plaintiff's *prima facie* case by producing evidence that: (1) removal of plaintiff from his principalship had been for administrative deficiencies; (2) other white applicants with poor records were not considered for the two positions; and (3) plaintiff's former female white assistant principal had been removed at the same time he had been removed as principal. However, in another case, a discharged black basketball coach was able to prove the pretextual nature of the school district's reasons for his discharge—win-loss record and a better qualified replacement—when the athletic director admitted that there were factors more important than win-loss records and the discharged coach was a better coach than his replacement.[9]

Generally, a charge of race discrimination will fail if the school can demonstrate that the reason for termination (e.g., teaching students the questions on a standardized achievement test) has been similarly applied to both black and white offenders.[10] In addition, in another case involving financial exigency, retention of a black male social worker over a white female social worker on the basis of an affirmative action plan, adopted to encourage greater minority distribution but not enacted to remedy prior governmental racial discrimination, was itself considered discriminatory because "the reservation of a particular position for a specific race in an affirmative action plan is invalid."[11]

---

7. Ad Hoc Comm. of Concerned Teachers v. Greenburgh No. 11 Union Free School Dist., 687 F. Supp. 914 (S.D.N.Y. 1988).
8. Brown v. Springfield City Schools Bd. of Educ., 689 F. Supp. 783 (S.D. Ohio 1988).
9. Jackson v. Birmingham Bd. of Educ., 695 F. Supp. 1164 (N.D. Ala. 1988).
10. Scoggins v. Board of Educ. of Nashville, Ark., 853 F.2d 1472 (8th Cir. 1988).
11. Cunico v. Pueblo School Dist. No. 60, 693 F. Supp. 954, 958 (D. Colo. 1988).

Where race discrimination has been proved, "reinstatement [of a discharged teacher] is the preferred remedy to avoid future lost earnings" but only if the teacher has not voluntarily withdrawn herself from teaching by taking a job in an unrelated field and if animosity between the teacher and the school district would make reinstatement impracticable.[12] In addition, a discharged teacher will be eligible for backpay, minus wages earned, and front pay from the time a position came open for which plaintiff was not hired, minus pro-rata salary deduction for the time the teacher failed to apply for the vacant position.[13]

Religion

Two cases involving religious discrimination were reported. Religious discrimination at the hiring stage tends to be more narrowly defined than at the discharge stage. However, an applicant who had filed a title VII action alleging discrimination on the basis of religion when he was not hired failed to establish a *prima facie* case because even though "plaintiff stated that he was a preacher, defendant never asked and plaintiff never indicated which particular denomination or religion he espoused."[14] In a discharge case, a tenured high school teacher was properly discharged when, despite an earlier warning and four day suspension, his "repeated references in the classroom to Christianity, God, the devil and demons, exceeded the constitutional boundaries within which discourse is permissible . . . [under] the Establishment Clause."[15]

Sex

Females alleging sex discrimination were generally successful in their claims. A female teacher prevailed in her claim when, during eight years, she had received only one administrative appointment to the lowest paying principal position in the district, and was passed over for thirteen administrative positions all filled by men who were less qualified.[16] The court rejected the superintendent's claims that his appointments were made after talking with community leaders, other administrators, and board members when board members testified they were not consulted prior to making a selection. Plaintiff was entitled to

12. Ellis v. Ringgold School Dist., 832 F.2d 27, 30 (3d Cir. 1987).
13. Johnson v. Chapel Hill Indep. School Dist., 853 F.2d 375 (5th Cir. 1988).
14. Durham v. Bleckley County School Sys., 680 F. Supp. 1555, 1559 (M.D. Ga. 1988).
15. Rhodes v. Laurel Highlands School Dist., 544 A.2d 562, 565 (Pa. Commw. Ct. 1988).
16. Spears v. Board of Educ. of Pike County, Ky., 843 F.2d 882 (6th Cir. 1988).

back pay and front pay equal to the highest paying of the positions for which she was passed over. In another case, a female teacher was successful in her claim that she was discriminatorily not promoted to one of thirteen available administrative positions.[17] The school system's policy of advertising positions was considered ineffective because advertisements were not placed where everyone could read them, advertisements were ambiguous as to the nature of the position, and advertisements were unclear as to whether a person with an application on file had to resubmit. Plaintiff was entitled to backpay and benefits and right of first refusal to a high school or elementary principalship, but not reinstatement because that would have displaced an innocent person.

A high school board's attempt to combine the football coach and athletic director positions established an inference of discriminatory animus when a female P.E. teacher, who had coached all women's sports and had worked in some capacity in all men's sports, was not eligible for the previously separate athletic director position because she was presumably not qualified as a football coach. The court's response to the school's bona fide occupational qualification (BFOQ) argument that the athletic director had to be merged with football, the school's "dominant sport," was, "logical and reasonable it may be, legitimate and nondiscriminatory it is not."[18] In another case, a school board policy of requiring women to choose between pregnancy disability or unpaid child care leave, and which prevented women from taking consecutive pregnancy disability and infant care leaves of absence, constituted sex discrimination under state law because the policy more harshly affected women.[19]

The cost to school districts of a successful sex discrimination lawsuit can be considerable. In one case, a female assistant principal who had won reinstatement and backpay and interest, also was awarded $170,000 in attorney's fees after the court had adjusted the normal rate upwards by 100% to halt a decline in "the state's already too small pool of attorneys willing to take civil rights cases . . . ."[20]

However, not all sex discrimination claims were successful. In one case, alleged remarks by an interviewer that some male employees did not want to work for a female supervisor were found to have no causal connection to plaintiff's denial of promotion because the interviewer

17. Tye v. Houston County Bd. of Educ., 681 F. Supp. 740 (M.D. Ala. 1988).

18. Wynn v. Columbus Mun. Separate School Dist., 692 F. Supp. 672, 685 (N.D. Miss. 1988).

19. Department of Civil Rights v. Brighton Area Schools, 431 N.W.2d 65 (Mich. Ct. App. 1988).

20. Hidle v. Geneva County Bd. of Educ., 681 F. Supp. 752, 759 (M.D. Ala. 1988).

had no effective role in the promotion decision.[21] In yet another case, a court held that an employer is not guilty of sex discrimination merely because it does not like being harassed by baseless charges of sex discrimination for nonselection to higher positions and alleged retaliation after a second nonselection. When an applicant has never been one of two top candidates for two different positions, an employer is not guilty of sex discrimination simply because one of the charges against it happens to be sex discrimination.[22]

Age

The 1986 ADEA amendments eliminated the seventy-year-old ceiling, but a teacher who had retired prior to January 1, 1987, the effective date of the 1986 amendments, had no cause of action under ADEA.[23] Where a valid ADEA claim exists the burden of proof for a complainant can be significant. The burden of proof for a *prima facie* ADEA case is preponderance of the evidence, but once a school has presented evidence of a nondiscriminatory reason for nonrenewal, the standard for complainant to rebut that evidence is "clear and convincing."[24] In another case of some procedural importance, a federal district court determined that the E.E.O.C. has jurisdiction to investigate and enforce its subpoena even though the filing of an ADEA complaint occurred beyond the two year statute of limitations, but within the three year statute of limitations for willful violations. The court reasoned that E.E.O.C. does not have to establish existence of willful violations before it can investigate because it has the authority to investigate at any time.[25] Finally, under a state statute, a tenured teacher who lost tenure at age seventy could not be denied a year-by-year contract solely on the basis of age.[26]

Handicap

The leading U.S. Supreme Court decision in *School Board of Nassau County v. Arline*[27] played a prominent part in two recent cases. In the remand of *Arline* to the federal district court, the court determined that the teacher who had occasional relapses of tuberculosis was nonetheless "otherwise qualified" to be employed because "the probability that she

---

21. Mira v. Monroe County School Bd., 687 F. Supp. 1538 (S.D. Fla. 1988).
22. Yatvin v. Madison Metro. School Dist., 840 F.2d 412 (7th Cir. 1988).
23. Williams v. Tucson Unified School Dist. No. 1 of Pima County, 760 P.2d 1081 (Ariz. Ct. App. 1987).
24. Graham v. Benbrook School, 692 F. Supp. 102 (D. Conn. 1988).
25. EEOC v. Ritenour School Dist., 692 F. Supp. 1068 (E.D. Mo. 1988).
26. Morrow v. Duval County School Bd., 514 So. 2d 1086 (Fla. 1987).
27. 480 U.S. 273 (1987).

[the teacher] would transmit tuberculosis to anyone was so extremely small as to not exist."[28] The court awarded back pay for the years 1979-83 when plaintiff attempted to mitigate damages and ordered her reinstated with full seniority and benefits, or in lieu of reinstatement, she was to receive $768,724 front pay from the 1988-89 school year. Following the lead of *Arline* a federal appeals court ordered a preliminary injunction to prevent reassignment for a teacher with AIDS of hearing-impaired students. The court reasoned that "section 504 allows the exclusion of an employee only if there is a *significant* risk of communicating an infectious disease to others."[29]

In two other cases finding for plaintiff-employees, a state could not revoke a bus driver's license simply because he had diabetes, as long as there was no evidence plaintiff's diabetes impaired his operation of a bus,[30] and a school district could not terminate a bus driver on the recommendation of the school district's physician without the driver first having an opportunity to be examined by a cardiologist.[31] On the other hand, a school does not have to offer a disabled employee available and suitable positions if the positions required student contact and the nature of the employee's disability would have caused her to reject the offers.[32] Finally, section 504 is not an exclusive remedy for handicapped persons. Handicap discrimination can be brought under either section 504 or section 1983, or both.[33]

SUBSTANTIVE CONSTITUTIONAL RIGHTS

Cases reviewed in this section concern freedom of speech, association, and religion; the right to privacy; and the right of those with liberty and property interests not to be treated by government in an arbitrary or capricious fashion (i.e., the right to substantive due process under the fourteenth amendment—where state government is concerned; or under the fifth amendment—where the federal government is concerned). In general, a state statute providing that a substitute teacher had to repay unemployment compensation benefits received during holiday

28. Arline v. School Bd. of Nassau County, Fla., 692 F. Supp. 1286, 1292 (M.D. Fla. 1988).

29. Chalk v. United States Dist. Ct. Cent. Dist. of Cal., 840 F.2d 701, 707-8 (9th Cir. 1988) (emphasis in original).

30. Jackson v. State, 544 A.2d 291 (Me. 1988).

31. Sitler v. New York State Div. of Human Rights, 520 N.Y.S.2d 653 (App. Div. 1987).

32. Robinson v. School Dist. No. 1, Multnomah County, 759 P.2d 1116 (Or. Ct. App. 1988).

33. Cordero Martinez v. Aponte-Roque, 685 F. Supp. 314 (D.P.R. 1988).

periods because he had an assurance of reemployment was not violative of substantive due process.[34]

Speech

Protected free speech is limited to matters of public concern. A dismissed teacher and coach, who alleged his comments about the reason for his earlier dismissal as coach were protected free speech, was engaged only in self-serving statements of private concern, not matters of public concern.[35] Similarly, a school district employee dismissed with two others after an altercation was unsuccessful in his claim that his dismissal was retaliation for his participation in a grand jury investigation of school district expenses, when the employee could not prove "substantial probability" that his supervisor acted with a retaliatory motive.[36]

In a reverse free speech case, a white principal of a mostly black elementary school who was reassigned after verbal accusations by mostly black parents, did not have a civil rights complaint against the parents because the parents' charges were opinions only and were protected free speech. Some of the charges were "[the principal is] very insensitive to the needs of our community;" "she is a racist;" "our children are afraid of her;" "we do not need a dictatorship in our children's school."[37]

Association

School employee association rights tend to focus on employment decisions allegedly based on an employees' political affiliation or union activity. The largest category of association rights cases continues to involve the change of political parties in the 1984 Puerto Rican election and the termination of employees of the losing party. In all four reported cases the discharged employees lost in their association right claims because the education employer was able to demonstrate nondiscriminatory reasons for its decisions: elimination of a position that had been created in violation of state statutes;[38] discharge of fixed-term employees at the end of their contracts with no evidence that the discharges were because of political affiliation;[39] and the transitory nature of an

34. Berland v. Employment Security Dep't of Wash., 760 P.2d 959 (Wash. Ct. App. 1988).

35. Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988).

36. Hughes v. Halifax County School Bd., 855 F.2d 183, 186 (4th Cir. 1988).

37. Stevens v. Tillman, 855 F.2d 394, 400 (7th Cir. 1988).

38. Rojas v. Aponte-Roque, 678 F. Supp. 23 (D.P.R. 1987); Carrasquillo v. Aponte-Roque, 682 F. Supp. 137 (D.P.R. 1988).

39. Hernandez Acevedo v. Aponte Roque, 684 F. Supp. 18 (D.P.R. 1988).

employee's position which was subject to annual renewal.[40]

In yet another case, a discharged teacher was not able to establish a *prima facie* case under a "but for" test that she was discharged for union activity when her discharge was supported by weak discipline, poor working relationships with administrators, and poor attitude toward work assignments.[41] Under the "but for" test an employee's claim is defeated if the employer can prove by a preponderance of the evidence that the discharge would have occurred anyway for a legitimate reason even had the employee been able to make out a *prima facie* case of discharge for union activity. On the other hand, a school board's termination of an automatic payroll dues deduction service for the local NEA affiliate was held to state a section 1983 cause of action to destroy associational rights where the local association lost members and dues revenues after the termination.[42]

Privacy

In the one case reported in this area, a school board did not violate a teacher's privacy rights when it required, after the teacher had allegedly grabbed a student in a stranglehold, that the teacher see a psychiatrist before returning to work. Because the information revealed to the psychiatrist about marriage, family history, and other personal relationships was not revealed to the school board, there was no invasion of privacy. "A school committee . . . may justifiably compel a teacher or administrator to submit to a psychiatric examination as a condition of continued employment if the committee has reason to believe that the teacher or administrator may be jeopardizing the welfare of students under his supervision."[43]

Substantive Due Process

Violation of substantive due process tends to occur when state actions are arbitrary, capricious, or unfair in substance, rather than lacking in procedural correctness, so as to deprive a school employee of a property or liberty right. Substantive due process was not denied when a probationary administrator whose position was eliminated was offered a lower position, although the highest position available at that time, because probationary employees had no entitlement to continued

---

40. Vazquez v. Aponte Roque, 678 F. Supp. 37 (D.P.R. 1988).

41. Hardin County Educ. Ass'n v. Illinois Educ. Labor Relations Bd., 528 N.E.2d 737 (Ill. App. Ct. 1988).

42. Georgia Ass'n of Educators v. Gwinnett County School Dist., 856 F.2d 142 (11th Cir. 1988).

43. Daury v. Smith, 842 F.2d 9, 14 (1st Cir. 1988).

employment and thus no protectable property interest.[44] Similarly, a state statute denying credit for military service toward a teacher's retirement pension was held to further a legitimate state interest of preventing an unnecessarily duplicative state expense and did not violate any constitutional rights of the teacher.[45]

PROCEDURAL DUE PROCESS

As a sequel to *Cleveland Board of Education v. Loudermill*,[46] the court of appeals affirmed the district court's determination on remand that a dismissed tenured school security guard had received constitutionally mandated requirements when he was confronted with a discrepancy on his application and failed to furnish clarifying evidence during the next four-to-five days.[47] The procedural due process provided the security guard accorded with the Supreme Court's standard for a pretermination hearing of a tenured employee: oral or written notice of charges; explanation of the employer's evidence; and an opportunity for the employee to present his side. However, the discharged guard was entitled to attorney's fees as the prevailing party because the Supreme Court decision had established new procedural law. The *Loudermill* conclusion seems to have been reinforced in another case where failure of a school board to follow proper procedures under the state code in cancelling a principal's contract did not necessarily state a section 1983 claim because "a section 1983 due process claim is not controlled by state law" but by federal constitutional standards.[48]

Procedural due process very much flows from employment entitlement, such as tenure, or from contractual requirements. Thus, a tenured teacher who resigned prior to his dismissal hearing before the school board had no procedural due process claims because upon resignation he lost "his property and tenure rights to that job."[49] However, an oral resignation will not terminate a protectable property interest and a procedural right to a due process hearing if state law provides that public officers can resign only in writing.[50] In another case, an employer terminated without notice of charges or opportunity for a hearing had a viable cause of action because an entitlement exists when contract

---

44. Smith v. Board of Educ. of Chicago, 853 F.2d 517 (7th Cir. 1988).
45. Morris v. Public School Employees Retirement Sys., 538 A.2d 1385 (Pa. Commw. Ct. 1988).
46. 470 U.S. 532 (1985).
47. Loudermill v. Cleveland Bd. of Educ., 844 F.2d 304 (6th Cir. 1988).
48. Ray v. Birmingham City Bd. of Educ., 845 F.2d 281, 283 (11th Cir. 1988).
49. Swann v. Caylor, 516 So. 2d 699, 701 (Ala. Civ. App. 1987).
50. Petrella v. Siegel, 843 F.2d 87 (2d Cir. 1988).

language states "that an employee can be fired only upon a showing of 'good cause.'"[51]

A party whose procedural due process rights have been violated may nonetheless find that any financial award is minimal. An assistant principal discharged for insubordination was entitled to only $1.00 nominal damages for deprivation of procedural rights, because even if all due process had been satisfied, the plaintiff assistant principal would still have been fired.[52] In addition, plaintiff was denied section 1983 compensatory damages or tort theory principles of impairment of reputation, personal humiliation, and mental anguish, and plaintiff was awarded attorneys' fees only for the time spent on the procedural due process representation.

Liberty and Property Interests

Some cases implicate both liberty and property interests. A school principal denied consideration for a deputy superintendent position because of a prior conflict of interest conviction had no protectable liberty interest because he was not deprived of "liberty to pursue a broad range of employment opportunities in the field of education" and no one had stigmatized him "by publishing false, defamatory information."[53] The principal also had no property interest in being considered for a vacant position. Similarly, a head baseball coach nonrenewed as coach had no property right where state tenure law did not grant tenure to assignments additional to teaching and he had not been stigmatized by difficulty in finding another coaching job because "disappointment is not a loss of that liberty which the Constitution guarantees."[54]

Liberty claims very often relate to an employee's reputation. However, courts have tended to impose a "stigma plus" standard, namely that reputation be tied to a tangible benefit such as employment. Thus, a nonrenewed basketball coach who retained his teaching job had no liberty claim, especially where the school board had refused to give any public reasons for the nonrenewal.[55] Similarly, a list of six school board reasons for dismissing a superintendent which included "ineffective leadership" and "lack of communication with personnel" did not implicate a liberty interest because they "[did] not involve moral turpitude or even an intrinsic character defect," but rather were "unelaborated charges relating to job performance suggest[ing] a

---

51. Courtemanche v. Enlarged City School Dist., 686 F. Supp. 1025, 1028 (S.D.N.Y. 1988).
52. Rogers v. Kelly, 674 F. Supp. 1372 (E.D. Ark. 1987).
53. Lavelle v. Quinones, 679 F. Supp. 253, 256 (E.D.N.Y. 1988).
54. Lagos v. Modesto City Schools Dist., 843 F.2d 347, 350 (9th Cir. 1988).
55. Diehl v. Albany County School Dist. No. 1, 694 F. Supp. 1534 (D. Wyo. 1988).

situational difficulty that, as part of [plaintiff's] biography, invite inquiry, not prejudgment."[56] In a similar vein, a teacher advised by a consultant to visit a dentist to improve the conditions and appearance of teeth and to lose weight did not have a liberty claim because the school district took no action to compel compliance.[57] Finally, a teacher was not entitled to a name-clearing hearing after allegedly false and defamatory charges had been removed from his personnel file. "That potential employers *could* have gained access to [plaintiff's] file in the interim period before removal of the allegations is not of sufficient consequence by itself to implicate a liberty interest under the fourteenth amendment."[58]

A reduction in an employee benefit will not necessarily implicate a constitutional property interest if there is an adequate state remedy. Thus, reduction in accumulated sick days so that a teacher's unused sick leave days were reduced from 142 to twenty-nine did not present a property claim where "the deprivation is a simple breach of contract and there is adequate state breach of contract action available as a remedy."[59]

Aspects of Notice

Some courts have tended to strictly construe notice requirements. Thus, when a state statute requiring ninety days written notice of inadequate classroom performance prior to giving notice of intention not to reemploy was not followed, the teacher was entitled to a contract for one more year.[60] Even in the absence of a statute specifying a number of days, notice to terminate a teacher must be reasonable. Thus, reception by tenured teachers one or two days prior to a school board dismissal hearing of letters of intent to terminate was held unreasonable because "it deprived the teachers of any opportunity to challenge the bases for their proposed dismissals."[61] However, the constitutional standard for notice will be satisfied as long as the employee received notice of charges and had an opportunity to refute the charges and present mitigating circumstances. Those constitutional criteria were met for an employee who was notified of reprimand and possible future action as a result of an altercation with the president of the school board.

---

56. Bristol, Va. School Bd. v. Quarles, 366 S.E.2d 82, 86-87 (Va. 1988).
57. Mermer v. Constantine, 520 N.Y.S.2d 264 (App. Div. 1987).
58. Brandt v. Board of Coop. Educ. Servs., 845 F.2d 416, 418 (2d Cir. 1988).
59. Ramsey v. Board of Educ. of Whitley County, Ky., 844 F.2d 1268, 1273 (6th Cir. 1988).
60. Wheeler v. Yuma School Dist. No. 1, 750 P.2d 860 (Ariz. 1988).
61. Farley v. Board of Educ. of County of Mingo, 365 S.E.2d 816, 819 (W. Va. 1988).

The employee in fact responded the following day with his version of the incident, and was notified later that in addition to a reprimand he would be reassigned.[62]

Aspects of Hearing

A considerable amount of litigation involving hearings has highlighted the profuse number of issues in this area. In two cases, the United States Supreme Court's decision in *Cleveland Board of Education v. Loudermill*[63] was subjected to interpretation. A tenured teacher's due process rights were violated when he was not provided a pretermination hearing prior to a school board's nonrenewal decision,[64] but *Loudermill* did not extend to a predemotion hearing where declining class size resulted in teacher reduction from full to part-time.[65] However, under *Loudermill*, failure to accord an employee an appropriate pretermination hearing (if required) will deprive the supervisor or administrator of qualified immunity in a section 1983 lawsuit if "infringement of [the employee's] right to procedural due process should have been apparent to a reasonable official . . . ."[66]

In general, a full hearing is not constitutionally required for probationary teachers if state law provides that the probationary teacher "may be terminated without a hearing and without specific reasons being stated . . . ."[67] However, where a hearing is required, an employee will have been considered to have been deprived of the "minimal requirements of fair play" where he was denied prior to the hearing a list of those making allegations against him and specific facts supporting the charges, and was denied during the hearing an opportunity to cross-examine witnesses.[68]

Employees will sometimes claim that an infirmity in a hearing entitles them to a new hearing. However a new hearing is not required if the employee had actual notice of the statutory provision he claims is the basis for a new hearing and, in fact, had an opportunity to be heard.[69] But a new hearing was ordered when, during a lunch recess in the original hearing, the hearing officer's sitting with the witness and counsel

---

62. Steele v. Board of Educ. Inglewood Unified School Dist., 251 Cal. Rptr. 360 (Ct. App. 1988).
63. 470 U.S. 532 (1985).
64. Short v. Kiamichi Area Vocational Technical School Dist. No. 7, 761 P.2d 472 (Okla. 1988).
65. Reed. v. Vocational Technical School, 535 A.2d 1229 (Pa. Commw. Ct. 1988).
66. Runge v. Dove, 857 F.2d 469, 472 (8th Cir. 1988).
67. Blum v. Quimones, 526 N.Y.S.2d 611 (App. Div. 1988).
68. Casada v. Booneville School Dist. No. 65, 686 F. Supp. 730, 732 (W.D. Ark. 1988).
69. Degnan v. Bering Strait School Dist., 753 P.2d 146 (Alaska 1988).

for the school board was considered to be an "appearance of impropriety."[70]

The most frequently litigated issue concerning hearings is whether they are impartial, but the proof required to show lack of impartiality or bias is formidable. Employees have been unsuccessful in their claims for a new hearing where they have not been able to prove "actual bias in the proceeding"[71] or "a substantial temptation [by a board member] to prejudge the case."[72] In one case, a letter of notice from the Commissioner of Education to RIF two teachers, incorrectly stating that the teachers' contracts would be terminated and implying board action, was insufficient to establish that the board was not impartial when it later voted to terminate the two teachers.[73] The mere fact that members of a school board perform an investigative/prosecutorial function in issuing a termination notice to a continuing teacher and then perform an adjudicative function in holding the hearing does not establish "actual bias or partiality."[74] However, evidence of malice toward a discharged employee by one of the school board members will be sufficient to prevent granting a motion for summary judgment for a defendant school board.[75]

Occasionally, federal constitutional claims were raised regarding hearings, but all were unsuccessful. A tenured teacher had no right under either the Constitution or the state dismissal statute "to be adequately represented by counsel in a civil matter or an administrative hearing."[76] In one case reported at both district and appeals court levels, courts found no fifth amendment self-incrimination where an employee facing a dismissal hearing and a criminal charge for the same act was refused his request to have the dismissal hearing postponed. The courts found no constitutional requirement that a hearing be postponed "pending disposition of the criminal charges"[77] and no constitutional infirmity in requiring the employee "to choose between giving testimony at the discharge hearing, a course that may help the criminal prosecutors, and keeping silent, a course that may lead to the loss of employment."[78]

---

70. Wells v. Del Norte School Dist., 753 P.2d 770, 772 (Colo. Ct. App. 1988).
71. Plymouth-Canton Community School Dist. v. State Tenure Comm'n, 419 N.W.2d 783, 785 (Mich. Ct. App. 1988).
72. State Tenure Comm'n v. Randolph County Bd. of Educ., 523 So. 2d 1076, 1077 (Ala. Civ. App. 1988).
73. Heithoff v. Nebraska State Bd. of Educ., 430 N.W.2d 681 (Neb. 1988).
74. Rouse v. Scottsdale Unified School Dist., 752 P.2d 22, 27 (Ariz. Ct. App. 1988).
75. Cook v. Board of Educ. for the County of Logan, 671 F. Supp. 1110 (S.D. W. Va. 1987).
76. Wolfe v. Board of Educ. of Chicago, 524 N.E.2d 1177, 1179 (Ill. App. Ct. 1985).
77. Peiffer v. Lebanon School Dist., 848 F.2d 44, 46 (3d Cir. 1988).
78. Peiffer v. Lebanon School Dist., 673 F. Supp. 147, 151 (M.D. Pa. 1987).

DISMISSAL, NONRENEWAL, DEMOTION, AND DISCIPLINE

State statutes, local board policies, and local collective bargaining contracts outline the procedures that must be followed and the charges that may be levied when employees are subjected to many types of adverse employment actions. Defining the nature of discipline and analyzing the broad range of effects of discipline or teacher removal constituted the largest category of cases. A teacher who had charges for dismissal dropped against him after two years was not entitled to salary increases for those two years because failure to award a salary increase was not *de facto* discipline under state law.[79] A teacher holding an indefinite teaching contract, and also a definite year-by-year principal's contract, could have his principal position terminated when his teaching contract was terminated because one contract was dependent on the other.[80] A school bus operator dismissed for failing to have working flashing lights was considered to have been dismissed for willful neglect of duty and was ineligible for unemployment compensation benefits.[81] However, in another case, a school employee's indefinite suspension without assurance of reinstatement made the employer eligible for unemployment compensation.[82] A discharged tenured high school teacher who lost his lawsuit for reinstatement was assessed over $10,000 of the school board's attorneys fees.[83] On the other hand, the effects of discipline may be unfavorable to a school district, or simply not unfavorable to the employee. A teacher who took an unapproved leave of absence for illness could not, under state law, have those days subtracted from his seniority so as to affect priority for furlough.[84] In one case, the burden of proof was on the school board to prove the amount of mitigating wages a wrongfully discharged teacher could have earned[85] and in another case wages earned by a wrongfully discharged teacher during the summer could not be used to reduce a backpay award.[86] When another teacher was awarded six months backpay, he was also entitled to an award of attorneys' fees even though it was not clear whether the backpay was awarded under the breach of contract or section 1983 claim.[87] In a special category of teacher removal cases,

---

79. Horton v. Jefferson County-Dubois Area Vocational Technical School, 545 A.2d 1294 (Ind. Ct. App. 1987).

80. Chambers v. Central School Dist. School Bd. of Greene County, 514 N.E.2d 1294 (Ind. Ct. App. 1987).

81. Prine v. West Carroll Parish School Bd., 515 So. 2d 1196 (La. Ct. App. 1987).

82. Pueblo School Dist. v. Martinez, 749 P.2d 1005 (Colo. Ct. App. 1988).

83. Introcaso v. Cunningham, 857 F.2d 965 (4th Cir. 1988).

84. Big Beaver Falls Area School Dist. v. Cucinelli, 535 A.2d 1205 (Pa. Commw. Ct. 1988).

85. State v. Bexley City School Dist., 528 N.E.2d 1250 (Ohio 1988).

86. Harris v. Bauer, 749 P.2d 1068 (Mont. 1988).

87. Lofft v. State Bd. of Higher Educ., 750 P.2d 515 (Or. Ct. App. 1988).

special school board agreements to remove teachers in lieu of teacher litigation against the board[88] or in lieu of a disciplinary hearing against the teacher[89] have been upheld.

School board dismissals have been upheld where the teacher did not abide by the district's residency requirements[90] and where the teacher had been on disability leave for more than twelve months.[91] School board nonrenewal of an employee has been upheld where the employee had received notice required by statute,[92] the employee had failed to give the school board timely notice of his intent to return to teaching after a leave of absence,[93] and the board's decision was for a lawful, rational, nonarbitrary, nonstatutory reason.[94] A final category involved interpretation of collective bargaining contracts or the relationship between those contracts and state law. In one case, dismissal of a nontenured teacher was found to be subject to the grievance procedure in the collective bargaining agreement.[95] But in two other cases, the state tenure statute preempted the collective bargaining contract and a probationary teacher could be nonrenewed without cause.[96] Collective bargaining provisions which include a special incentive to encourage early retirements will be upheld as long as they are not subterfuges for circumventing the state tenure statute.[97]

Insubordination

School boards were successful in discharging employees for insubordination in a wide range of situations. Employees were successfully discharged for continually refusing to wear a nursing cap[98] and for continued use of profanity in the presence of students after a prior directive to cease.[99] A school principal who had conducted thirty observations of a teacher and then refused to cooperate at the teacher's

88. Emerick v. Teaneck Bd. of Educ., 534 A.2d 1044 (N.J. Super. Ct. App. Div. 1987).
89. Cooke v. Board of Educ. of Lawrence School Dist., 528 N.Y.S.2d 140 (App. Div. 1988).
90. McClelland v. Paris Pub. Schools, 742 S.W.2d 907 (Ark. 1988).
91. *In re* Johnson, 415 N.W.2d 751 (Minn. Ct. App. 1987).
92. Guyse v. Morgan County Bd. of Educ., 516 So. 2d 692 (Ala. Civ. App. 1987).
93. Kolenberg v. Board of Educ. of Stamford, 536 A.2d 577 (Conn. 1988).
94. Spurlin v. School Bd. of Sarasota County, 520 So. 2d 294, 296 (Fla. Dist. Ct. App. 1988).
95. Mifflinburg Area Educ. Ass'n v. Mifflinburg Area School Dist., 545 A.2d 419 (Pa. Commw. Ct. 1988).
96. Fontana Teachers Ass'n v. Fontana Unified School Dist., 247 Cal. Rptr. 761 (Ct. App. 1988); Miller v. Board of Educ., Unified School Dist. 470, 744 P.2d 865 (Kan. Ct. App. 1987).
97. Board of Educ. for the Garden City Dist. v. Brisbois, 417 N.W.2d 84 (Mich. Ct. App. 1987).
98. Distelzweig v. Hawkes Hosp. of Mt. Carmel, 518 N.E.2d 43 (Ohio Ct. App. 1986).
99. Ware v. Morgan County School Dist., 748 P.2d 1295 (Colo. 1988).

dismissal hearing with the result the charges against the teacher had to be dropped could be suspended twenty-four days for insubordination.[100] A charge of insubordination was upheld in two separate cases where teachers publicly shouted at their principals in the presence of students and generally treated them in a disrespectful manner.[101]

However, insubordination charges have not been upheld in all situations. A teacher was not insubordinate when she refused to attend a convocation with religious content, especially when the principal had announced to the school that anyone could be excused who objected on religious or other grounds.[102] A tenured teacher who had problems oversleeping and who failed to meet with summer school students while teaching on a special summer contract could not have his regular year contract terminated for insubordination on the basis of what occurred under a separate contract.[103]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

School boards have generally been successful in disciplining or removing employees under this broad category. Teacher dismissals have been upheld where teachers have verbally or physically assaulted or abused students[104] and have drunk beer with students at an away basketball game.[105] A one-year suspension was upheld for a teacher who furnished students advance information about examination questions[106] and for a teacher on full disability leave who taught at two other schools.[107] Dismissals were upheld for employees who failed to follow the district's purchase procedures,[108] who used obscene language to fellow employees and vendors,[109] and who made numerous phone calls to an administrator during early morning hours without a legitimate communication purpose.[110] In a different vein, a substitute teacher, whose name was dropped from the substitute list for "misconduct"

---

100. Stutzman v. Chicago Bd. of Educ., 525 N.E.2d 596 (Ill. App. Ct. 1988).

101. Caldwell v. Blytheville Ark. School Dist., 746 S.W.2d 381 (Ark. Ct. App. 1988); Kleinberg v. Board of Educ., 751 P.2d 722 (N.M. Ct. App. 1988).

102. Werble v. Hamilton Heights School Corp., 519 N.E.2d 185 (Ind. Ct. App. 1988).

103. Fisher v. Board of School Trustees of the Mt. Pleasant Township Community Schools, 514 N.E.2d 626 (Ind. Ct. App. 1986).

104. *In re* Cowan, 541 A.2d 298 (N.J. Super. Ct. App. Div. 1988); Turner v. Alabama State Tenure Comm'n, 523 So. 2d 401 (Ala. Civ. App. 1987); Friedland v. Ambach, 522 N.Y.S.2d 696 (App. Div. 1987).

105. Blaine v. Moffat County School Dist. No. 1, 748 P.2d 1280 (Colo. 1988).

106. Hyde Park Cent. School Dist. v. Ambach, 530 N.Y.S.2d 902 (App. Div. 1988).

107. Bassett Unified School Dist. v. Commission on Professional Competence, 247 Cal. Rptr. 865 (Ct. App. 1988).

108. Spradlin v. Board of Trustees of Pascagoula Mun. Separate School Dist., 515 So. 2d 893 (Miss. 1987).

109. Secor v. Hyde Park Cent. School Dist., 530 N.Y.S.2d 599 (App. Div. 1988).

110. Schuster v. Babylon Union Free School Dist., 526 N.Y.S.2d 191 (App. Div. 1988).

because she was repeatedly unavailable, did not have an action for defamation.[111]

Teachers prevailed in three cases. In one case, a teacher's reference to a girl as a "slob" and an overweight boy as "Goodyear" did not support contract termination.[112] In a second case, a teacher discharged after failing a star basketball player was ordered reinstated.[113] In that case, the teacher had been threatened by athletic department personnel, had a petition for dismissal circulated by the basketball coach's daughter, had a bullet shot through her car windshield while she was driving her car, and was subjected to a school button sale celebrating the shooting. In a state labor relations case, a decision by a school board not to renew a tenured teacher as assistant track coach after he had pleaded guilty to a DWI charge was an unfair labor practice.[114]

Immorality

Courts have tended to uphold school board dismissals where immorality is involved. Teacher dismissals were upheld for writing "disgusting, disturbing and upsetting" letters to students,[115] for fondling the genital area of a typewriter salesman,[116] and for providing alcohol to underaged students.[117] Discharge of a teacher's aide for having sexual intercourse with a female juvenile-student-detainee was also upheld.[118] However a teacher could not be dismissed for immoral conduct where she falsely reported she was ill so she could attend the landing of the space shuttle.[119] Similarly, a teacher who had engaged in "horseplay" in spraying students with a liquid substance could not be discharged for immorality despite an administrative directive teachers would be punished if they engaged in such conduct with students on the last day of school.[120]

Incompetence

A broad range of conduct can be included with a charge of

---

111. Goralski v. Pizzimenti, 540 A.2d 595 (Pa. Commw. Ct. 1988).
112. Trustees of Lincoln County School Dist. v. Holden, 754 P.2d 506 (Mont. 1988).
113. McGhee v. Miller, 753 S.W.2d 354 (Tenn. 1988).
114. Board of Educ. of Danville Community Consol. School Dist. v. Illinois Educ. Labor Relations Bd., 529 N.E.2d 1110 (Ill. App. Ct. 1988).
115. Dobanic v. Commonwealth, 533 A.2d 812, 815 (Pa. Commw. Ct. 1987).
116. Stephans v. Board of Educ. of School Dist. No. 5, 429 N.W.2d 722 (Neb. 1988).
117. Norton v. Board of Educ. of Jefferson County Schools, 748 P.2d 1337 (Colo. Ct. App. 1987).
118. School Bd. of Seminole County v. Unemployment Appeals Comm'n, 522 So. 2d 556 (Fla. Dist. Ct. App. 1988).
119. Fontau Unified School Dist. v. Burman, 753 P.2d 689 (Cal. 1988).
120. Everett Area School Dist. v. Ault, 548 A.2d 1341 (Pa. Commw. Ct. 1988).

incompetence. In one case, discharge of a tenured teacher was supported by smoking in front of students in the classroom, using inappropriate language in front of students and fellow employees, leaving the classroom unattended, failing to submit proper plans, using inappropriate classroom materials that created danger to students, and making harassing phone calls to a female assistant principal.[121] In cases with less sweeping charges, teacher dismissal has been upheld for ineffective classroom discipline[122] and for failure to remedy teaching deficiencies for such matters as outlining objectives, sequencing subject matter, following lesson plans, and maintaining adequate and accurate grades.[123] Dismissal of an account clerk was upheld for transferring, without authorization, funds from one account to another so that she could be paid.[124]

In only one case was a teacher successful. A teacher seeking a transfer in the district after her position had been eliminated and who did poorly in four structured interviews could not be discharged solely on the basis of the interviews when her thirteen years of satisfactory classroom performance were not taken into consideration.[125]

Compliance with School Board Policies and State Statutes

Courts have tended to give great latitude to school boards in complying with a variety of statutory requirements. A school board policy regarding notice of nonrenewal for probationary teachers enacted pursuant to a state statute could be applied to all probationary teachers, "whether they are employed before or after the policy is adopted."[126] Compliance with various aspects of statutory notice has been generously construed. Thus, written notice of charges for dismissal which did not comply with statutory requirements were considered adequate, where the letter regarding dismissal referred to a formal evaluation given one month earlier[127] and where the teacher's defense at the full adversarial hearing dealt squarely with the grounds for dismissal.[128] In two other cases, a statutory requirement of a decision

121. Bradshaw v. Alabama State Tenure Comm'n, 520 So. 2d 541 (Ala. Civ. App. 1988).

122. Mongitore v. Regan, 520 N.Y.S.2d 194 (App. Div. 1987).

123. DeBernard v. State Bd. of Educ., 527 N.E.2d 616 (Ill. App. Ct. 1988); Atherton v. Board of Educ. of School Dist. of St. Joseph, 744 S.W.2d 518 (Mo. Ct. App. 1988).

124. Van Gorder v. Board of Educ. of Unatego Cent. School Dist., 527 N.Y.S.2d 654 (App. Div. 1988).

125. Trustees, Missoula County School Dist. No. 1 v. Anderson, 757 P.2d 1315 (Mont. 1988).

126. Central Educ. Agency v. George West Indep. School Dist., 750 S.W.2d 900 (Tex. Ct. App. 1988).

127. Adkins v. Hazelwood School Dist., 743 S.W.2d 869 (Mo. Ct. App. 1987).

128. Thompkins v. Stuttgart School Dist., 858 F.2d 1317 (8th Cir. 1988).

five days after a dismissal hearing was interpreted to mean a reasonable amount of time[129] and a statutory requirement of a registered letter with notice of extension, reasons, and corrective measures was interpreted to mean actual notice.[130] In one case, a nonrenewal notice received one day prior to the last day of employment satisfied state law,[131] but in another state, where efforts at remediation had to precede nonrenewal, reception of notice of nonrenewal on the last possible day did not comply with the state statute as a matter of law.[132] In a nonnotice case, a court upheld under state law a collective bargaining contract provision permitting assessment of service fees to nonunion teachers even when the service fee exceeded the cost of union dues.[133]

Courts have upheld a wide range of school board decisions and policies made pursuant to state statutes: dismissal of a teacher for excessive force toward students in violation of board policies;[134] termination of a tenured teacher who returned her contract one day late;[135] and termination of teachers who did not meet appropriate certification requirements.[136] Teachers also lost in a variety of other board decisions made pursuant to state statutes: discontinuance of local school district salary supplements which exceeded the statutory minimum base salaries and increments;[137] denial of a contractual benefit for the time between a board hearing at which a procedural error occurred and a subsequent hearing at which the error was corrected;[138] and denial of back salary after a probationary teacher's nonrenewal had been reversed.[139]

A number of cases have found that school board actions have not complied with state law; a finding of a breach of duty where the same person, serving as superintendent of public schools and a township trustee, voted on a tax issue;[140] attempting to maintain a teacher termination proceeding for an indefinite period of time in violation of

---

129. Larsen v. Oakland Community School Dist., 416 N.W.2d 89 (Iowa Ct. App. 1987).

130. Matthiessen v. Board of Educ. of N. Chicago Community High School Dist. 124, 857 F.2d 404 (7th Cir. 1988).

131. Wright v. Tarrant City Bd. of Educ., 518 So. 2d 144 (Ala. Civ. App. 1987).

132. McCrackin v. Elko County School Dist., 747 P.2d 1373 (Nev. 1987).

133. Kilpatrick v. Board of Educ. of Fairfield, 535 A.2d 1311 (Conn. 1988).

134. Dooley v. Fort Worth Indep. School Dist., 686 F. Supp. 1194 (N.D. Tex. 1987).

135. Niedbalski v. Board of Educ. of School Dist. No. 24 of Platte Center, 418 N.W.2d 565 (Neb. 1988).

136. Abell v. Nash County Bd. of Educ., 365 S.E.2d 706 (N.C. Ct. App. 1988); Bradley v. Beach Pub. School Dist., 427 N.W.2d 352 (N.D. 1988); Feldhusen v. Beach Pub. School Dist., 423 N.W.2d 155 (N.D. 1988).

137. Allen v. Lumberton Indep. School Dist., 746 S.W.2d 524 (Tex. Ct. App. 1988).

138. Parliament v. Yukon Flats School Dist., 760 P.2d 513 (Alaska 1988).

139. Frasier v. Board of Educ. of the City School Dist. of N.Y., 530 N.Y.S.2d 79 (App. Div. 1988).

140. Contesti v. Attorney General, 416 N.W.2d 410 (Mich. Ct. App. 1987).

the Fair Dismissal Act;[141] failure to give adequate nonrenewal notice prior to a school merger with the result that the new school district was bound to honor the teachers' contracts;[142] refusal to permit employee discovery of personnel records to determine if his discharge was for justifiable cause;[143] attempting to nonrenew a teacher for refusing to accept a supplemental contract for coaching;[144] and attempting to impose multiple penalties of reprimand and suspension upon a teacher when state statute required choosing only one penalty.[145] A school board's effort to reduce a teacher's salary to 80% when she was reduced to 4/5 teaching load was held to be a termination under the state tenure law and thus subject to procedure criteria.[146] A school board must accept the factual finding of a statutory referee in a termination hearing, unless against the preponderance of the evidence[147] and a school custodian who alleged he was discharged for filing a workman's compensation claim was entitled to trial on a state law retaliation theory.[148] In an unusual case involving an extraordinary writ, a grounds employee whose firing was disaffirmed by the state's Civil Service Commission was entitled to a writ of mandamus for reinstatement.[149]

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate a reduction-in-force (RIF). The sufficiency of reasons for RIF, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state tenure statutes, local board policies, and/or collective bargaining agreements. RIF employees usually do not have a legitimate claim of entitlement to positions that invokes constitutional due process, but substantive criteria and procedures specified by state law must be followed.

---

141. Bolton v. Board of School Comm'rs of Mobile County, 514 So. 2d 820 (Ala. 1987).
142. Hilton v. Pine Bluff Pub. Schools, 748 S.W.2d 648 (Ark. 1988).
143. Ollie v. Highland School Dist. No. 203, 749 P.2d 757 (Wash. Ct. App. 1988).
144. Hachiya v. Board of Educ., Unified School Dist. No. 307, 750 P.2d 383 (Kan. 1988).
145. McSweeney v. Board of Educ. of Johnsburg Cent. School Dist., 525 N.Y.S.2d 956 (App. Div. 1988).
146. Marshall v. Russo, 242 Cal. Rptr. 657 (Ct. App. 1987).
147. Aldridge v. Huntington Local School Dist. Bd. of Educ., 527 N.E.2d 291 (Ohio 1988).
148. Sloan v. Jasper County Community Unit School Dist., 522 N.E.2d 334 (Ill. App. Ct. 1988).
149. State *ex rel.* Schneider v. Board of Educ. of N. Olmsted City School Dist., 530 N.E.2d 206 (Ohio 1988).

Necessity for Reduction-in-force

Two cases revealed that courts do scrutinize carefully the necessity for RIF. In one case, although termination of a special education teacher was not upheld, the court observed that a decrease in funding did not automatically justify a decrease in special education teaching positions, especially in light of the legislature's express intention to protect special education programs.[150] In the other case, a school board decision to reduce a tenured teacher from full-time to half-time was reversed because the evidence at the hearing failed to establish a change in circumstances necessitating a reduction-in-force (i.e., whether the selection was to be on the basis of seniority, participation in other activities, a combination of those considerations, or on some other undisclosed basis).[151]

Elimination of Position

Occasionally litigation concerns the effects of eliminating positions. In one case, a tenured principal, who was transferred to Director of Special Services and Facilities after his principal position had been abolished, was entitled to keep the position of director even though he was the least senior principal.[152] Under the law of another state, an illegally demoted employee could seek damages and reinstatement when his position was eliminated and his employment terminated.[153] In a related case, a school board could not be held in contempt for failing to fill a teaching vacancy as ordered by an arbitrator where the vacancy no longer existed due to declining school enrollment.[154]

Selection of Employees

All of the cases in this area deal with interpretations of state law, and sometimes those interpretations can involve extremely technical aspects. In one state, even a probationary teacher nonrenewed because of budgetary cutbacks was entitled to know upon request the basis for reduction (e.g., diminished enrollment or lack of funds).[155] A number of

---

150. Taborn v. Hammonds, 371 S.E.2d 736 (N.C. Ct. App. 1988).

151. Trolson v. Board of Educ. of School Dist. of Blair, 424 N.W.2d 881, 884 (Neb. 1988).

152. Board of Educ. of Pleasantville Union Free School Dist., 522 N.Y.S.2d 830 (Pa. Commw. Ct. 1988).

153. Jost v. Phoenixville Area School Dist., 547 A.2d 830 (Pa. Commw. Ct. 1988).

154. Mahopac Teachers v. Board of Educ. of the Mahopac Cent. School Dist., 533 N.Y.S.2d 520 (App. Div. 1988).

155. Kennedy v. Board of Educ. of School Dist. of Ogallala, Keith County, 430 N.W.2d 49 (Neb. 1988).

cases dealt with the selection of employees to be RIFed and involved a number of unique scenarios: the date certification was received in a supplemental area[156] was the key for seniority purposes; selection within one organizational unit such as an Interdistrict Cooperative unit must be separate from each constituent school district;[157] part-time work of an employee waiting for title I funding did not constitute a break in service reducing his seniority;[158] and, reducing a tenured elementary art teacher who was qualified to teach junior high art, while a nontenured junior high art teacher was retained to teach, diluted tenure rights by affording a nontenured teacher seniority.[159] In one state where RIF selection of employees was to be accomplished according to a statutory point system, an employee selected to be discharged because of teaching deficiencies had to "be retained pursuant to the point system notwithstanding his failure to score well in the area of teacher performance."[160] In one case where selection depended upon application of unpaid absence credit toward seniority, one teacher with 3.085 years seniority was retained over a teacher with 3.081 years.[161] In a selection case unrelated to RIF, selection of an employee to fill a vacated position was set aside where state law required posting all vacancies for at least five working days.[162]

Realignment/Reassignment

Reassignments to new positions will generally be upheld if not arbitrary and capricious and accomplished pursuant to state statute. The choice of the person to fill a vacancy will not be considered arbitrary or capricious if neither the person assigned nor the person complaining was certificated in the area and a late resignation left little time for advertisement.[163] In one case, reassignment of a nontenured teacher from a classroom music teacher to a permanent substitute did not violate the tenure and dismissal act[164] while in two other cases reassigned or reclassified school personnel were entitled under state law to advance reasons for the decisions.[165] In yet another case, reassignment of a

156. Jarrett v. Wattsburg Area School Dist., 533 A.2d 1008 (Pa. 1987).
157. Mohn v. Independent School Dist. No. 697, 416 N.W.2d 494 (Minn. Ct. App. 1987).
158. School Dist. of Duquesne v. Sturm, 547 A.2d 891 (Pa. Commw. Ct. 1988).
159. Bednar v. Westwood Bd. of Educ., 534 A.2d 93 (N.J. Super. Ct. App. Div. 1987).
160. Murray v. Altheimer-Sherrill Pub. Schools, 743 S.W.2d 789 (Ark. 1988).
161. Cohen v. Emerson Bd. of Educ., 542 A.2d 489 (N.J. Super. Ct. App. Div. 1988).
162. Marion County Bd. of Educ. v. Bonfantino, 366 S.E.2d 650 (W. Va. 1988).
163. State v. Bledsoe County Bd. of Educ., 751 S.W.2d 819 (Tenn. 1988).
164. Christie v. San Miguel County School Dist., 759 P.2d 779 (Colo. Ct. App. 1988).
165. State v. Raleigh County Bd. of Educ., 367 S.E.2d 223 (W. Va. 1988); Kelly v. Board of Educ. of Chicago, 527 N.E.2d 510 (Ill. App. Ct. 1988).

full-time tenured teacher to a part-time position meant she had to be paid proportionate to the union contract because under state law a reduction in compensation for tenured teachers could not occur except for inefficiency, incapacity, or unbecoming conduct.[166] An administrator who was reassigned to teaching because of incompetency was entitled to a statutory evaluation of her competency since none of the thirty reasons for transfer dealt with incompetency.[167] In this particular case the teacher was not entitled to be reinstated but she was entitled to be compensated for diminution in salary as a result of the transfer. Numerous school board reassignments were upheld where a principal could be reassigned to classroom teaching without an evaluation prior to assignment;[168] five teachers' seniority rights in existing schools did not entitle them to priority in assignment to a new program;[169] and a furloughed industrial arts teacher could not require reassignment of other industrial arts teachers with more seniority to teach other courses where none of those teachers had majors in any field other than industrial arts.[170]

Call Back Rights

Call back rights generally seem to be controlled by a collective bargaining agreement. Thus, a union contract RIF list making a teacher eligible for the first vacant position for which she is qualified must be complied with.[171] Failure to reinstate a teacher to the first vacant position can result in a damages award equal to the pay the teacher would have received from the date of reinstatement and would continue until she is reinstated.[172] In cases involving special call-back problems, a teacher can be given additional experience credit prior to being excessed so she would have more years of seniority for call-back purposes;[173] offering a tenured teacher on a call-back list a substitute teaching assignment was not the next "vacancy" pursuant to the requirement of the state statute;[174] and a teacher on a RIF list who

166. Bassett v. Board of Educ. of the Borough of Oakland, 538 A.2d 395 (N.J. Super. Ct. App. Div. 1988).

167. Hahn v. Alvord Unified School Dist., 252 Cal. Rptr. 471 (Ct. App. 1988).

168. Quirk v. Board of Educ. of Moorpark Unified School Dist., 244 Cal. Rptr. 924 (Ct. App. 1988).

169. School Comm. of Boston v. Boston Teachers Union, 514 N.E.2d 678 (Mass. App. Ct. 1987).

170. *In re* Nelson, 416 N.W.2d 848 (Minn. Ct. App. 1987).

171. Sherman v. School Comm. of Whitman, 522 N.E.2d 433 (Mass. Ct. App. 1988).

172. Kohler v. Board of Educ., S. Huntington Union Free School Dist., 530 N.Y.S.2d 844 (App. Div. 1988).

173. Mahony v. Mahopac Cent. School Dist., 532 N.Y.S.2d 390 (App. Div. 1988).

174. Gladding v. Board of Educ. of Kings Park Cent. School Dist., 523 N.Y.S.2d 877 (App. Div. 1988).

acquires a new certification while on the list has the right to fill the first vacancy in that new area of certification.[175]

CONTRACT DISPUTES

Board Policies and Contract Stipulations

The nature of a school employees contract and differing interpretations of the provisions in that contract tend to foster litigation. Litigation frequently involves contract silence or contract ambiguity. A collective bargaining contract provision stating that teachers wishing salary increments for taking courses must first consult with the superintendent was held to grant no authority for the superintendent to approve or disapprove the courses taken.[176] Part-time teachers' salary could be set at 1/2 the contract salary step by the school board when the contract was silent regarding part-time teachers' pay.[177] Teachers could not have their pay docked for failure to attend a parent-teacher's conference when the teachers were not compensated for their attendance and the contract was silent regarding possible sanctions for failure to attend.[178] A teacher had a cause of action to determine whether the amount of union agency fees to be paid under the union contract by nonunion teachers was only the $17 local fee or also the $200 state and national fee.[179] In a slightly different case, a school secretary won reinstatement where a principal's personal notes were "personal records" within the meaning of the collective bargaining agreement and were in violation of that agreement.[180]

A contract can both limit and permit school board action. Two human relations positions to be filled under court-ordered desegregation were not subject to arbitration under a collective bargaining contract as to whether the positions must be awarded to those with more seniority.[181] A school board which had adopted certain nonracial objective criteria concerning filling vacant positions must follow those criteria[182] and contract provisions must be followed regarding documentation proce-

175. Whitley v. Canton City School Dist. Bd. of Educ., 528 N.E.2d 167 (Ohio 1988).
176. Board of Educ. of Mt. Sinai Union Free School Dist. v. Mt. Sinai Teachers' Ass'n, 527 N.Y.S.2d 484 (App. Div. 1988).
177. Beeson v. Wyndmere Pub. School Dist. No. 42, 427 N.W.2d 346 (N.D. 1988).
178. Wilkes-Barre Area Educ. Ass'n v. Wilkes-Barre Area School Dist., 538 A.2d 81 (Pa. Commw. Ct. 1988).
179. Whittier Regional School Comm. v. Labor Relations Comm'n, 517 N.E.2d 840 (Mass. 1988).
180. Oregon School Employees Ass'n v. Lake County School Dist., 763 P.2d 160 (Or. Ct. App. 1988).
181. Board of Educ., Yonkers City School Dist. v. Yonkers Fed'n of Teachers, 533 N.Y.S.2d 761 (App. Div. 1988).
182. Purnell v. Covington County Bd. of Educ., 519 So. 2d 560 (Ala. Civ. App. 1987).

dures prior to dismissing an employee for habitual tardiness.[183] Where a collective bargaining contract had two provisions, "inefficient and incompetent service" requiring sixty days to remedy deficiencies and "conduct seriously prejudicial" permitting immediate suspension with pay, a court is bound by a school board's definition of "conduct" to include five fights which occurred in a teacher's classroom during one classroom morning.[184] On the other hand, a superintendent's three-year contract which contained a salary figure for only the first year was void as to the last two years.[185] A nontenured teacher with five satisfactory evaluations in two years could be nonrenewed at the end of the second probationary year of teaching without first having to be accorded a plan of assistance provided in the contract for those teachers receiving unsatisfactory evaluations.[186] A tenured teacher's resignation did not require school board acceptance to become effective where the school district's policy manual provided that the superintendent could waive the thirty day notice of resignation requirement when a satisfactory replacement was found.[187] A board of education rule prohibiting an employee in the district from supervising a "near relative" was not enforced arbitrarily or capriciously when the wife of an assistant principal teaching in his school was assigned to another school in the district.[188]

Three cases involved school board decisions and pension rights. Teachers in one case were able to recover pension benefits plus interest based on a school board Supplementary Retirement Plan.[189] Eligibility for retirement benefits under board-approved early retirement is the date the approval notification is mailed for purposes of calculating the thirty day conversion period.[190] In the third case, a $14,000 lump sum paid by a school board as a retroactive salary increase in exchange for waiver of all other claims and rights including unused vacation and sick leave may have been compensation for services actually rendered, thus entitling the teacher to pension credit.[191]

Administrative Regulations and Statutory Provisions

School board actions have implicated a wide variety of state or

183. Oregon School Employees Ass'n v. Rainier School Dist., 754 P.2d 9 (Or. Ct. App. 1988).
184. Whitfield v. Little Rock Pub. Schools, 756 S.W.2d 125 (Ark. Ct. App. 1988).
185. Klotz v. Savannah R-III School Dist., 747 S.W.2d 708 (Mo. Ct. App. 1988).
186. Miller v. Board of Educ., Unified School Dist. No. 470, 752 P.2d 113 (Kan. 1988).
187. Sinkevich v. School Comm. of Raynham, 530 N.E.2d 173 (Mass. 1988).
188. Solomon v. Quinones, 531 N.Y.S.2d 349 (App. Div. 1988).
189. Hewel v. Board of Educ. of City School Dist., 527 N.Y.S.2d 493 (App. Div. 1988).
190. McKenna v. Prudential Ins. Co. of Am., 539 A.2d 1266 (N.J. Super. Ct. 1988).
191. Norris v. State Teachers Retirement Sys. of Ohio, 520 N.E.2d 5 (Ohio Ct. App. 1988).

federal statutes. Two cases involved teachers reinstated after military service. In one case a teacher who had been accorded full seniority upon reinstatement also had to be afforded salary placement[192] while in another case reinstated teachers were entitled to full seniority but not to retirement credits toward their pensions.[193]

State statutes frequently place limitations on the manner in which school boards can interpret contracts. In Texas, twenty contract days paid by local funding beyond the 183 could be paid only according to the state tenure statute.[194] A teacher whose disability application had been approved by the school board could not be required to immediately take disability retirement but was permitted the option under state statute to first exhaust his accrued unused sick leave, thus continuing to receive his regular salary.[195] School custodians with a fifty-two week work contract of employment were entitled to recover unemployment compensation for the week between Christmas and New Year's Day when they were laid off during that week by the school district.[196] A school district, which hired several teachers and awarded them more than the five years experience credit permitted by state statute, was required to award credit for all prior teaching experience to every teacher hired that year, as opposed to simply giving those teachers back pay for that one year.[197] A school board's effort to reclassify three months of a substitute teachers service so as to deprive her of statutory reemployment rights for the following year was held to be a subterfuge in violation of a state statute concerning substitute teachers.[198] Under a state statute prohibiting public officers from having any direct interest in any contract, teaching contracts entered into between the school board and spouses of board members were null and void.[199] However, the board members did not have to make restitution for compensation received by spouses because the taxpayers received full value for the services and the board members acted in good faith.

In two peripheral cases, a state statute prohibiting a certificated teacher from serving on the board of education did not apply to the

---

192. Lang v. Great Falls School Dist. No. 1, 842 F.2d 1046 (9th Cir. 1988).

193. Rhode Island Fed'n of Teachers v. Employees Retirement Sys., 542 A.2d 249 (R.I. 1988).

194. James v. Hitchcock Indep. School Dist., 742 S.W.2d 701, 706 (Tex. Civ. App. 1987).

195. State *ex rel.* Runyan v. Henry, 516 N.E.2d 231 (Mich. Ct. App. 1988).

196. Billups v. Howell Pub. Schools, 423 N.W.2d 231 (Mich. Ct. App. 1988).

197. United Teachers of Ukiah v. Board of Educ., Ukiah Unified School Dist., 251 Cal. Rptr. 499 (Ct. App. 1988).

198. Eureka Teacher's Ass'n v. Board of Educ. of the Eureka City Schools, 247 Cal. Rptr. 790 (Ct. App. 1988).

199. Smith v. Dorsey, 530 So. 2d 5 (Miss. 1988).

Board of Estimate[200] and statutorily mandated contributions to the Minnesota Teachers Retirement Association were property of a teacher's estate which could be reached by creditors in a bankruptcy proceeding.[201]

TENURE

"Tenure" is a statutory right to continuing contract status which also entitles tenured employees to procedural due process protection and to termination "for cause." Certificated personnel such as teachers and principals can acquire tenure in most states and noncertificated personnel can acquire tenure in some states.

Some states permit teacher or administrative tenure to attach if a person moves vertically from one category to another, but in other states a probationary period must be served after any change in certificated category. It is more likely that certificated administrators will already be certificated teachers for purposes of vertical movement than vice versa. Tenure transfer from one district to another in the state is controlled by state law.

Tenure Status

Tenure is normally acquired at the elementary or secondary level by being offered a contract for the year beyond the statutory number of probationary years. In one case, a teacher who had received notice of dismissal during the second of two year probationary period not only did not acquire tenure, but found that her section 1983 claim was consequently adversely affected.[202]

The kind of contract offered may affect tenure status. In two separate cases, teacher service under a substitute contract,[203] and even a part-time contract, were credited toward tenure.[204] However, in another state two years teaching service under a full-time substitute contract did not count toward the three year probationary period.[205] In a slightly different vein, a school psychologist and a social worker who had served in those nonteaching functions for three and seven years respectively had not satisfied the two year probationary period to qualify for a teaching certificate.[206] Similarly, tenured teachers who

---

200. Schulman v. O'Reilly-Lando, 545 A.2d 241 (N.J. Super. Ct. App. Div. 1988).
201. *In re* Swanson, 79 B.R. 422 (D. Minn. 1987).
202. Dunlop v. Colgan, 687 F. Supp. 406 (N.D. Ill. 1988).
203. Hawkins v. Ohio County Bd. of Educ., 369 S.E.2d 224 (W. Va. 1988).
204. Williams v. Board of Educ. of Hardin County Community Unit School Dist. No. 1, 520 N.E.2d 603 (Ill. App. Ct. 1988).
205. Burns v. State, 529 So. 2d 398 (La. Ct. App. 1988).
206. Oates-Ulrich v. Okemos Bd. of Educ., 415 N.W.2d 213 (Mich. Ct. App. 1987).

were also employed as school bus drivers could not acquire tenure as bus operators and were therefore not entitled to protection under the bus operator tenure law.[207]

Tenure can even bridge a period of time when a teacher has apparently been laid off. A tenured teacher, laid off in 1984 and rehired in 1985 as a nontenured teacher, but who had won through grievance procedure reinstatement of sick leave and seniority for 1984-85 was held to have retained tenure during the lay-off.[208]

Transfer of tenure can arise at two dimensions: transfer of a teacher from one existing district to another; and transfer of a teacher from an existing district to a newly created district. In the former situation, a tenured teacher in New York was required to serve a two year probationary period after transferring to another district.[209] In the latter situation, a teacher in districts divided to include the old and a new school district had to be accorded tenure status in the new district, apparently because the governing board of the new district had stated in a resolution that it would recognize the tenure status of teachers in the old district.[210]

Tenure of Default or Acquiescence

Tenure by default or acquiescence can arise when a teacher seeks to take advantage of a school district's error or oversight. In one of only two cases in this area, a science teacher, who eventually won his lawsuit against the school district for failing to reemploy him as a probationary teacher, was awarded not only damages but also seniority and tenure on the theory that the length of the appeal exceeded the probationary period. In reversing the award of tenure the state supreme court observed that "[s]uch an award deprives [the school district] of an opportunity to fulfill its duty to review the services of probationary teachers to assure that they are satisfactory."[211] However, in the second case, a biology teacher, who had completed three years of per-diem substitute service and one year of full-time probationary service and who had been granted tenure on the mistaken belief that the per-diem teaching was to be credited toward tenure, could be removed only by following the tenure statute procedures.[212]

---

207. Thorne v. Monroe City School Bd., 531 So. 2d 567 (La. Ct. App. 1988).

208. Beck v. Cascade County School Dist. No. 1, 760 P.2d 83 (Mont. 1988).

209. Carpenter v. Board of Educ. of Locust Valley Cent. School Dist., 527 N.Y.S.2d 733 (App. Div. 1988).

210. Britt v. Red Mesa Unified School Dist. No. 27, 748 P.2d 202 (Ariz. 1987).

211. Boek v. Chippewa Valley Bd. of Educ., 422 N.W.2d 680, 683 (Mich. 1988).

212. Saul v. Board of Educ. of City School Dist. of N.Y., 526 N.Y.S.2d 528 (App. Div. 1988).

CERTIFICATION

Certification Standards

Agencies awarding certification are responsible for creating and enforcing regulations for those seeking certificates. Denial of a temporary per-diem teaching certificate for the city of New York was upheld on the basis of the applicant's "unsatisfactory physical and medical examination."[213] A teacher holding a New York City substitute teacher's license in early childhood claimed she was arbitrarily denied a regular teacher's license for grades two-to-six under a criterion conditioning an elementary teacher's license on "possession of a New York City license for any area of service;" however, a court upheld the certificate denial because the word "license" applies to a regular, not a substitute, position.[214]

Licensing agencies' discretion, however, does not extend to automatic exclusion. A bus driver whose visual acuity did not meet the state's vision standards, but who had driven a bus for twelve years, was entitled to have her certification reconsidered in light of her physician's testimony regarding her ability to compensate for her deficiency and in light of her good driving record.[215]

In a related set of facts, a physical education teacher who had moved from Ohio to Pennsylvania to teach stated a cause of action for detrimental reliance against the school district. The district had allegedly told the teacher that he was qualified for the position and that the district would file the application for certification, but the teacher found out after it was too late to enroll for additional college credits that he not only needed additional credits for state certification but he had to take unrequested leave of absence without pay and benefits.[216]

Decertification, Revocation, or Suspension

Certification agencies have broad, but not unlimited, discretion in penalizing persons holding certificates. A five-year teaching certificate revocation was permitted to stand because of substantial supporting evidence even though the decision referred to a memorandum regarding drug allegations which was outside the record.[217] A teacher who pled guilty to making sexual, harassing phone calls to two female students

---

213. Lipsman v. New York City Bd. of Educ., 520 N.Y.S.2d 190, 191 (App. Div. 1987).
214. Karp v. Board of Examiners of N.Y. City Bd. of Educ., 523 N.Y.S.2d 1015, 1017 (App. Div. 1988).
215. California School Employees Ass'n v. California Dep't of Motor Vehicles, 250 Cal. Rptr. 50 (Ct. App. 1988).
216. Travers v. Cameron County School Dist., 544 A.2d 547 (Pa. Commw. Ct. 1988).
217. Decola v. Castor, 519 So. 2d 709 (Fla. Dist. Ct. App. 1988).

and who had his teaching certificate suspended by a regional superintendent could have his certificate later revoked by the state superintendent for the same acts of misconduct.[218] However, in another case, changing a hearing examiner's penalty of a three-year suspension to a three-year revocation was too severe a penalty when the teacher had only one year in fourteen with an overall unacceptable evaluation.[219] A department of transportation's recall of a school bus driver's license because she had suffered a heart attack was not supportive of the charge of incompetency where the driver had periodic stress tests and her doctor testified that she had a lower risk of another heart attack than another person not so tested.[220]

In a military decertification case, a NJROTC instructor who was decertified by the naval officer supervising him, and who was thus terminated by the school as not having the requisite certification to teach, did not have a cause of action against the person who decertified him. The state civilian court reasoned that it could not second-guess military decisions about a "decertification [that] arose out of or was in the course of activity incident to service."[221]

218. Trigg v. Sanders, 515 N.E.2d 1367 (Ill. App. Ct. 1987).
219. Walker v. Turlington, 516 So. 2d 1123 (Fla. Dist. Ct. App. 1987).
220. Appeal of Stober, 546 A.2d 155 (Pa. Commw. Ct. 1988).
221. Norris v. Lehman, 845 F.2d 283, 287 (11th Cir. 1988).